

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion into Competition for
Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the
Commission's Own Motion into Competition for
Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)

**ASSIGNED COMMISSIONER'S RULING
REGARDING THE MOTION OF VERIZON
FOR INTERIM INTERCONNECTION AGREEMENT**

Verizon California Inc. (Verizon) filed on April 3, 2002, an "Emergency Motion for an Expedited Order Establishing an Interim Interconnection Arrangement with Pac-West Telecomm, Inc. (Pac-West) Pending Adoption of a Commission-Approved Successor Agreement" (Motion). Verizon asks that the Commission rule on its Motion prior to the expiration of the existing Interconnection Agreement due to occur on April 13, 2002. Verizon indicates that there is no provision in the interconnection agreement for extension beyond April 13, 2002.

Because the time that would normally be allotted to respond to Verizon's "Emergency Motion" under Commission rules extends beyond April 13, an ALJ ruling shortened the response time to its "Emergency Motion," to April 8, 2002. Pac-West filed a reply to Verizon's motion on April 8, 2002.

Background

Verizon brings its motion for Commission resolution of a dispute between Verizon and PacWest because their Interconnection Agreement is due to expire on April 13, and parties have no successor agreement in place. Section 9.02 of the existing Interconnection Agreement provides that, in the event the Agreement is terminated and a party requests negotiation of a new agreement within 60 days of the date of the termination notice, interconnection shall continue between the parties in accordance with the provisions of the terminated Agreement for a limited period of 125 days following the termination date. Once the Interconnection Agreement has been terminated pursuant to its terms, however, it does not continue in effect indefinitely while the parties negotiate a successor agreement.

Because parties' contract makes no provision for interconnection to continue beyond the contract termination date of April 13, an interim agreement is required pending completion of a successor agreement. Verizon accordingly requests that the Commission issue an order requiring Verizon and Pac-West to enter into an interim agreement to remain in place until the parties conclude negotiations and execute a replacement agreement. Verizon claims the parties are not expected to reach a new agreement by April 13, at which point the 125-day extension period expires.

For purposes of the interim agreement, Verizon proposes that the parties enter into Verizon's current "template" agreement. Upon execution of the replacement agreement, the interim template agreement would be superceded. In the alternative, Verizon proposes that PacWest be required to opt into one of the existing interconnection agreements between Verizon and another CLEC. The adoption of such interim agreement would continue in effect until the earlier

of the date the adopted terms expire or the date that the parties execute the replacement agreement.

Verizon claims that under either of its proposed options for interim agreements, the rates, terms and conditions applicable to Internet traffic would necessarily conform to the rate regime prescribed in the FCC's Order on Remand.¹ Paragraph 82 of the Order on Remand provides that the FCC's interim rate regime for ISP-bound traffic "applies as carriers re-negotiate expired or expiring interconnection agreements." Once the provisions of the terminated agreement are no longer effective, Verizon claims that the FCC's interim rates for ISP-bound traffic automatically apply while the parties negotiate the terms of a replacement agreement.

Pac-West agrees that Verizon has terminated the existing agreement, and that parties have not completed negotiations on a successor agreement. Pac-West opposes Verizon's proposals for an interim agreement, however, arguing that both of Verizon's proposed forms of relief are contrary to law, unfair to Pac-West, and premised on unproven or erroneous facts.

Pac-West believes that the issues raised in Verizon's motion need not have risen to the level of an "emergency," and should have been dealt with routinely in the current negotiations, as Pac-West and other competitive local exchange

¹ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001) (Order on Remand). At paragraph 82, the FCC mandated that "as of the date this Order is published in the Federal Register, carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic."

carriers have often done with Pacific Bell, and Verizon itself has done with other carriers, in similar negotiations.

Pac-West objects to Verizon's "template" agreement, arguing that its terms are one-sided, favoring Verizon. Pac-West also objects to being required to opt into an existing interconnection agreement that Verizon has negotiated or arbitrated with another party.

Pac-West has presented Verizon with a redline version of the "template" proposed by Verizon, and asks the Commission to require Verizon to interconnect with Pac-West pursuant to the terms of this Pac-West version if any one-sided agreement is going to be imposed.

Pac-West also disputes Verizon's claim that the FCC's capped rates for ISP-bound traffic "automatically" apply to a new contract. Pac-West argues that this claim is based upon Verizon's erroneous legal assumption that it has, in fact, implemented the FCC's reciprocal compensation plan in California. The FCC's rates for ISP-bound traffic do not automatically apply unless Verizon has successfully demonstrated that it has offered to exchange all traffic subject to Section 251(b)(5) at the same rate (the "mirroring offer").² In D.01-11-067, the Commission required that any carrier implementing the FCC plan, in its advice letters involved, "verify compliance with the FCC Order by confirming that it has offered to all carriers statewide to exchange all traffic both originating and terminating, and including Internet-bound traffic, at the FCC's capped rates."³

² See, Motion of Pac-West in R.00-02-005, filed June 15, 2001.

³ See *e.g.*, Verizon Advice Letter No. 10007 dated February 7, 2002, amending the interconnection agreement with VoiceStream Wireless Corporation to implement the FCC Order on Remand.

Pac-West claims that, after a diligent search, it has been unable to locate a single advice letter where Verizon has included this Commission-mandated verification.⁴

Pac-West thus asks that the Commission require parties to continue interconnection under the status quo, with resolution of the ultimate question of the rates and other terms and conditions applicable during this interim period to be an issue included in the arbitration conducted pursuant to Section 252(a).⁵ Pac-West expresses a willingness to stipulate to the entry of an appropriate accounting order until the issue is resolved. The accounting order would permit the Commission to subsequently adjust rates covering the interim period based upon the outcome of arbitration proceedings.

Discussion

To ensure continuity of service, interconnection must continue during the interval of time between the expiration of the parties' existing agreement and the effectiveness of a successor agreement. Since the parties failed to negotiate a provision in their existing agreement as to what terms would govern in the event of contract termination without a successor agreement, it falls upon the Commission to impose an interim arrangement.

Verizon seeks a Commission order imposing unilateral interim changes in the terms of interconnection prior to arbitration, and over the objections of PacWest. While Verizon proposes interim adoption of its "template," Pac-West

⁴ *FCC Order on Remand* at para. 82.

⁵ Although it is conceivable that this might be the only issue to be arbitrated, Pac-West's current opinion is that despite continued negotiations other issues will also require arbitration and that Verizon would be unlikely to differ with this view.

counters that its own “template” version should be adopted, if any changes are imposed by the Commission. Yet, there are no facts before the Commission at this juncture upon which to base a determination as to which of the competing “templates” (i.e., the Verizon version or the Pac-West version) is preferable as an interim agreement.

Based on its review of the existing Verizon agreements available for "opt-in," Pac-West states it would not voluntarily interconnect with Verizon under terms and conditions of any of them. If Pac-West found any such available interconnection agreement acceptable, it would have already opted into it.⁶ Likewise, there is no basis to compel Pac-West to take the terms and conditions of Verizon’s preferred “template” without providing Pac-West the opportunity to present in an arbitration its position on those terms and conditions which it perceives as unacceptable or undesirable.

Accordingly, neither of the alternatives proposed by Verizon is defensible as the basis for an interim agreement since each alternative would impose unilateral changes in the terms of interconnection without arbitration. There is no evidentiary record before the Commission as a basis to impose interim changes in the Interconnection Agreement that favor Verizon and disadvantage Pac-West, or vice-versa. Even though changes would apply only on an interim basis, they could still be unduly burdensome to the extent a carrier is required to modify its network, procedures, etc. only to have to change them again once a successor agreement is adopted.

⁶ 47 U.S.C. 252 (a), (b) and (e), as amended by the Telecommunications Act of 1996.

The only defensible alternative, therefore, is to continue the status quo agreement for the interim period. Both parties shall therefore be required to continue to be bound by the terms of the existing interconnection agreement until a successor agreement can be negotiated or arbitrated. During the interim period until a final successor agreement is implemented, all terms and conditions under the existing contract shall continue in place, including the payment of reciprocal compensation for Internet traffic. This directive is consistent with the FCC Remand Order and the Commission's own holdings in D.02-01-062 in which it stated that the interconnection agreement between Verizon and Pac-West will become subject to the FCC's restructured rates "at the time carriers renegotiate expired or expiring interconnection agreements." Since carriers have not yet concluded such renegotiations, the existing reciprocal compensation provisions continue in place.

The parties shall be directed, however, to include as an issue subject to arbitration, what differing terms and conditions, if any, should be applicable during the interim period between April 14, 2002, and the effective date of the successor agreement. In order to facilitate implementing any adjustments that may be subsequently applied to this interim period, each of the parties shall be required to retain adequate books and records relating to services provided and related payments made during the interim period subject to the existing interconnection agreement.

Verizon was granted leave on April 11 to file a reply to Pac-West's response. In its reply, Verizon argues that the Commission should not impose the old interconnection agreement on the parties because this would violate intent of the contract, as well as the terms of the FCC's Order on Remand and prior Commission's decisions. Verizon argues that it has properly terminated

the contract, and that Section 9.02 of the contract provides that it cannot continue in effect indefinitely while the parties negotiate a successor agreement. More specifically, Section 9.02 provides that if the parties cannot reach a new agreement in 125 days, they should seek resolution from the Commission. By creating a limited 125-day window in which the agreement would continue in effect during negotiations, Verizon argues that the parties expressed their intent that the agreement should not continue in effect after the close of that window.

I find Verizon's argument unconvincing. The stated intent of Section 9.02 is that parties would execute a replacement agreement *within* 125 days of the date that the agreement terminates. This has not happened. Parties have failed to reach any agreement concerning what terms of interconnection would apply *after* the 125-day window, beyond agreeing to seek resolution from the Commission. Therefore, since both parties have agreed to submit to the Commission's determination of what happens after April 13, Verizon cannot properly claim that temporary continuation of the existing contract violates parties' "intent." By leaving the dispute resolution in the hands of the Commission, each party took the risk that the Commission may reach an outcome with which one or the other would disagree.

Thus, the Commission can properly order temporary continuation of the existing contract pending parties' negotiation or arbitration of a replacement contract. The fact that Verizon may disagree with such a resolution cannot be construed as violation of the mutual "intent" under the contract since both parties agreed to submit to the Commission's resolution, whatever that resolution may be. I therefore find nothing that violates the "intent of the parties" by temporarily extending the term of the existing agreement beyond April 13.

By waiting until only 10 days before expiration of the 125-day window for the Commission to resolve the dispute, Verizon failed to provide sufficient time for the Commission to adjudicate any substantive changes in the terms of the old interconnection agreement that would be fair to both sides. Thus, by its delay in bringing this action to the Commission, and by its contractual agreement to defer to the Commission on this dispute, Verizon must bear the responsibility for accepting the resolution provided by the Commission given such short notice.

As a compromise, Verizon would agree to the terminated interconnection agreement remaining in effect pending Commission approval of a successor agreement, with the proviso that, effective April 14, 2002, Verizon not be required to pay Pac-West any compensation for Internet-bound traffic in excess of the FCC's interim rates. Verizon attaches to its reply a document entitled "Settlement Agreement and Release" which it asks the Commission to adopt to implement the terms of its compromise proposal.

Verizon's request that it be immediately relieved from the current contract's obligation's to pay reciprocal compensation for Internet-bound traffic in excess of the FCC's interim rates is a contested issue which cannot be finally decided through this ruling. Under the Remand Order, the FCC's capped rates are to take effect "as carriers renegotiate expired or expiring interconnection agreements." The parties have not yet renegotiated the expiring interconnection agreement. At this point, they have only agreed to disagree, and to leave it to the Commission to resolve how to continue interconnection after the end of the 125-window period, until the parties renegotiate or arbitrate a replacement interconnection agreement.

Further consideration will be necessary to determine whether a Commission order providing for the temporary extension of the existing contract

terms constitutes a change of the existing contract such that implementation of the FCC rate caps is triggered. For the interim period, however, the status quo shall remain in effect, including the provisions for payment of reciprocal compensation for Internet traffic. The Commission can take up the question of whether the provisions of the FCC Remand Order are triggered immediately upon the termination of the 125-window period, or whether the existing rates continue until a replacement agreement takes effect following negotiation and/or arbitration of the parties.

Verizon raises the concern that Pac-West is a credit risk, and that merely ordering an accounting of transactions, subject to later adjustment, will not provide for a neutral outcome. Verizon claims that allowing Pac-West to “hold the money” while this issue of compensation is being resolved significantly disadvantages Verizon. Verizon’s concerns on this point, as raised in a footnote in its reply comments, does not provide a full development of all of the relevant factual considerations with respect to the risk of nonpayment by Pac-West based on its credit worthiness. A further record would need to be developed before consideration could be given to measures to address Verizon’s claims regarding Pac-West’s ability to make payment of any subsequent adjustments that may be ordered. This issue is properly taken up in any subsequent arbitration proceeding between the parties, but not in this ruling.

Procedural Issues

By bringing its Motion before the Commission only 10 days before the expiration of the extension period of the interconnection agreement, Verizon has made it impossible for the issuance of an order by the full Commission prior to the expiration date. Under Public Utilities Code Section 311(g), the Commission decision on this motion is to be served on parties, subject to a 30-day public

review and comment period, prior to a Commission vote. The review period may be shortened or waived either by a stipulation of all parties to the proceeding, or in the event of an “unforeseen emergency situation” as defined by Rule 81 of the Commission’s Rules of Practice and Procedure. Verizon has not offered any argument that its motion constitutes such an “unforeseen emergency situation” or that all parties stipulate to a waiver of the 30 days under Commission Rules.

Moreover, there is no Commission meeting scheduled prior to the expiration of the contract on April 13 at which a proposed order could be considered (assuming there were time to prepare one). Verizon offers no solution as to how an order from the full Commission could be forthcoming prior to expiration of the contract.

Accordingly, to provide interim guidance to the parties until an order from the full Commission can be forthcoming, the following procedure shall apply. In my capacity as the assigned commissioner for this proceeding, I hereby issue the instant ruling pursuant to my authority under Public Utilities Section 310.⁷ The substance of this ruling shall be placed as an agenda item for consideration before the full Commission at the earliest practical time.

This ruling is issued out of necessity in order to avoid unintended termination of interconnection between Verizon and Pac-West due to lack of a

⁷ As prescribed by Public Utilities Code Section 310: “Any investigation, inquiry, or hearing which the commission may undertake or hold may be undertaken or held by or before any commissioner or commissioners designated for the purpose by the commission.... Every finding, opinion, and order made by the commissioner or commissioners so designated, pursuant to the investigation, inquiry, or hearing, when approved or confirmed by the commission and ordered filed in its office, is the finding, opinion, and order of the commission. “

binding interconnection agreement. I find that neither Verizon nor Pac-West have provided legitimate reasons why this matter could not have been brought before the Commission earlier, so as to achieve a resolution of the dispute by the full Commission before expiration of the interconnection agreement. Both parties should have acted more responsibly to bring this dispute before the Commission sooner. It is expected that in the future, these sorts of disputes will be brought before the Commission on a timely basis so as to avoid a repetition of this sort of incident.

IT IS RULED that:

1. The currently effective interconnection agreement between Verizon and Pac-West shall remain in effect until a final agreement is either negotiated or arbitrated.
2. Verizon and Pac-West should each be required to maintain adequate accounting and other records necessary in order to be able to specify in detail all amounts billed to, and payments received from, each of the parties for services rendered from the expiration under the existing agreement through the effective date of the successor agreement.
3. The Commission retains the right to adjust the amounts due and payable for services during the “gap” period subject to the ultimate determinations made concerning the terms of the successor agreement.
4. The untimeliness of Verizon’s filing of its motion precludes action by the full Commission prior to the expiration date of the existing agreement, due to occur on April 13, 2002.

5. Pending subsequent action on the motion by the full Commission, this ruling prescribes the interim action to be taken by the parties effective immediately pursuant to Public Utilities Code Section 310.

Dated April 12, 2002, at San Francisco, California.

/s/ MICHAEL R. PEEVEY

Michael R. Peevey
Assigned Commissioner

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail, to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Assigned Commissioner's Ruling Regarding the Motion of Verizon for Interim Interconnection Agreement on all parties of record in this proceeding or their attorneys of record.

Dated April 12, 2002, at San Francisco, California.

/s/ TERESITA C. GALLARDO
Teresita C. Gallardo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.